Circuit, affirmed the judgment of the lower court and denied appellant a right or cause of action under Article 2315 because of illegitimacy of the minor children. Appellant then sought review in the Supreme Court of Louisiana and was denied a writ of certiorari. From this denial, an appeal to the Supreme Court of the United States was taken and relief was granted to appellant.

I. THE COURT HAS FUNDAMENTALLY ALTERED THE INTERPRETATIVE GUIDELINES OF THE EQUAL PROTECTION OF THE LAWS CLAUSE BY MAKING THE TEST OF CONSTITUTIONALITY RATIONALLY IN THE MIND OF THE COURT.

Traditionally, the Court has approached State legislation challenge on equal protection of the laws grounds from two points of view. Those statutes which make classifications based upon racial grounds are manifestly unconstitutional, patently invidious and can only be sustained by some overriding purpose. *Loving vs. Commonwealth of Virginia*, 388 U.S. 1, 87 S.Ct. 817 (1967); *McLaughlin vs. Florida*, 379 U.S. 184, 85 S.Ct. 283 (1964). The other approach to equal protection of the laws cases starts with a presupposition that a State law is presumably constitutional and must be shown to be intentionally and purposely discriminatory, arbitrary and without reason. *Morey vs. Doud*, 354 U.S. 457, 77 S.Ct. 1344 (1957); *McGowan vs. State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1960); *Stebbins vs. Riley*, 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884 (1924); *Steier vs. N. Y. State Ed. Comm.*, 271 F.2d 13 (2d Cir. 1959); *Hanna vs. Home Ins. Co.*, 281 F.2d 298 (5th Cir. 1960); *Tullier vs. Giordano*, 265 F.2d 1 (5th Cir. 1959); *Ventre vs.*

Ryder, 176 F.Supp. 90 (W.D. La., 1959); *W.M.C.A. vs. Simon*, 208 F. Supp. 368 (S.D.N.Y., 1962). Intentional or purposeful discrimination is not presumed. Unreasonableness is not presumed. *Snowden vs. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1943). Merely because the Court entertains a different set of social beliefs, it will not substitute its judgment for that of a State Legislature. *Ferguson vs. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028 (1963).

The decision of the Court in the instant case departs from the traditional concepts of equal protection of the laws and substitutes a new test, that of rationality in the mind of the Court. The Court declares that regardless of the test used in establishing a classification, the end result "is whether the line drawn is a rational one." According to the Court, its assessment of rationality will be the test of whether or not a non-racial classification is invidious. The instant decision fails to adhere to the traditional test of whether a State statute is arbitrary, intentionally and purposefully discriminatory and without any justifiable reason. The Court has failed in this case to presume rationally on the part of a State Legislature and has rather substituted its own assessment of what is rational and proper. Thus, the Court has pruned from the usual equal protection of the laws test the requirement that a State statute, in order to run afoul of the constitution, be shown to be intentionally and purposefully discriminatory and entirely unreasonable. The Court has abandoned the presumption that such statutes are reasonable and non-discriminatory.

Using the simple test of rationality, whatever a majority of the Court decides is rational will prevail over whatever the majority of the members of the State Legislature conclude is rational. Thus, the instant case departs from the traditional equal protection of the laws thinking and extends that clause into a veritable overriding veto passing upon the wisdom of the State Legislature.

II. THE RIGHT TO SUE FOR WRONGFUL DEATH IS NOT A FUNDAMENTAL CIVIL RIGHT; ALL THAT IS INVOLVED IS A PROPERTY RIGHT.

This is a case which concerns only the right to sue for wrongful death. It does not concern the right to vote. It does not concern racial discrimination in public education nor does it concern freedom of speech, press or assembly. The right to sue is not one of those inalienable rights of men.

The action for wrongful death did not exist at Common Law or at Civil Law. *Panama R. Co. vs. Rock*, 266 U.S. 209, 45 S.Ct. 58, 69 L.Ed. 250 (1924). The right of action for wrongful death had to await statutory development in the 19th and 20th centuries. Article 2315 by its very terms declares the right to recover damages as being a property right. "A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survives, is inherited by his legal instituted or irregular heirs, whether suit has been instituted thereon by the sur-

vivor or not." The Court in its opinion declares that the rights involved concern the intimate familial relationship between child and mother. How that relationship is fostered, denied or destroyed by whether or not an action for wrongful death lies is not conceivable. A familial relationship by its very nature has nothing to do with the action for wrongful death.

All of those States of the Union which do not permit illegitimate children to sue nevertheless permit the members of a family who are illegitimate to enjoy the full family relationship. Indeed, that was the case with regard to the Levy children according to the pleadings. Illegitimate children are not taken from their mother, they are not separated or placed in orphanages nor are they precluded from any of the other civil rights that humans enjoy. Their status, however, precludes them from having certain property rights and these arise solely from the fact that they are not legitimate members of a family and therefore do not have rights in the property of the family. They may marry, may own land or hold offices.

It is indeed anomalous to hold that a fundamental and intimate family relationship is dependent upon whether or not a party has an action for the wrongful death for the member of a family.

III. BY PERMITTING ILLEGITIMATES TO SUE, THE COURT HAS INTRODUCED A NEW ARBITRARINESS, UNREASONABLENESS AND ARTIFICIALITY INTO THE LAW OF WRONGFUL DEATH WHICH WILL ULTIMATELY RESULT IN CREATING THE BASIC UNFAIRNESS THE COURT FEELS IT IS AVOIDING.

According to the Civil Code, law is an expression of legislative will and "it orders and permits and forbids, it announces rewards and punishments, its provisions generally relate not to solitary or singular cases, but to what passes in the ordinary course of affairs." Art. 2. The law relating to the action for wrongful death must be viewed not in terms of solitary or singular cases, but rather in terms of ordinary course of affairs. While it is true that the Levy children, according to the pleadings, were indeed close to their mother, the general social history reveals that illegitimates have generally tended to be less close to their families than legitimates.

Under the thinking of the Court, an illegitimate child who had no association with his father or mother ever might enjoy the action for wrongful death and preclude an action on the part of a parent who was close and intimate with the deceased. By same token, a common law wife could preclude a loving mother or father from suing.

Undoubtedly, the Legislature in drafting Articles 2315 and 3556 of the Civil Code, faced important problems as to who might be accorded the action for

wrongful death. Ideally speaking, it would have been wonderful to have accorded an action to all persons who suffer personal loss upon the death of another. But, as a matter of practical consideration, the administration of law would have been chaotic indeed where this would have been allowed. The Legislature in recognizing the generality of affairs, selected certain classes of persons who would have status to sue and arrange them in a hierarchy. First in the hierarchy are the surviving spouse and child or children. In the normal course of affairs, these are the persons who are closest to the deceased. Following the surviving spouse and children, the Legislature next gave the action to the surviving father and mother. The father and mother are undoubtedly next most interested and closest to the decedent. Following them, the brothers and sisters of the decedent may sue. Undoubtedly, the Legislature recognize that in the generality of events, legitimate relations are stronger and firmer than illegitimate ones. In permitting illegitimate children to sue, the Court will undoubtedly preclude surviving parents who have been close to a decedent from suing.

Indeed, the decision of the Court will mean that tort feasors go free. If a tort feasor were to show that the decedent left an illegitimate child and no one knew where that illegitimate might be found, only that illegitimate or his heirs would have the cause of action and the parents who had nurtured and cared for and loved the decedent would be precluded from suit. Thus, in the name of equal protection of the laws, the tort feasor would go free on the basis of the decision

in the instant case. The mere existence of an illegitimate child somewhere or the existence of heirs of that illegitimate child somewhere would result in there being no possible action on the part of the surviving parents. *Trahan vs. Southern Pacific Co.*, 209 F.Supp. 334 (W.D. La. 1962); *Horrell, et al. vs. Gulf & Valley Cotton Oil Co.*, 15 La. App. 603, 131 So. 709 (1930); *Smith vs. Monroe Grocery Co.*, 171 So. 167 (La. App. 1936).

IV. THE COURT ERRS IN ASSUMING THAT THE LOUISIANA LEGISLATURE CREATED A CLASS OF LEGAL NON-PERSONS, DENIED FUNDAMENTAL FAMILIAL RELATIONSHIPS AND GRANTED FREEDOM TO THE TORT FEASOR ON ACCOUNT OF THE ILLEGITMACY OF THE CHILDREN.

Louisiana has made legal non-persons out of no one. Illegitimate children may marry, bear children, be raised by parents, bring legal actions, inherit, own land, hold office, attend schools, enjoy public amusements, engage in all occupations and are free to develop themselves to their fullest capacities. They may form corporations and those corporations are wholly and purely legal. To say that persons who may engage in all of these activities are legal non-persons and cannot enjoy and indulge in fundamental familial relationship is to disregard fact. By contrast, Louisiana has taken the view that the illegitimate is to be brought in to the fullest of rights wherever feasible. The illegitimate child can be legitimated with ease. All that is necessary is an acknowledgement before a Notary and two witnesses. Louisiana Civil Code Ar-

ticle 200, Louisiana Revised Statutes 9:391. According to Article 917, et seq., natural or illegitimate children have certain rights of inheritance. Pursuant to these articles, the law has seen to it that they have an alimony. Under the Workmen's Compensation Statute, they may have a right of recovery for the death of a supporting parent. La. Rev. Stat. Ann. §§ 23:1231, 1252, 1253; *Thompson vs. Vestal Lbr. & Mfg. Co.*, 208 La. 83, 119, 22 So.2d 842 (1945). Louisiana has evinced a concern for the illegitimate rather than treating him as a legal non-person devoid of possible family relationships.

The argument that the tort feasor is permitted to go free is similarly lacking in merit. In the Levy case, a legitimate mother claims the right to sue for the wrongful death of Louise Levy. Her action would have been entirely good had she filed it within the one year allowed by law. Indeed, assuming that the mother had timely filed this action, the Court would have had to decide an entirely different issue. The Court would have had to have determined whether the State of Louisiana might confer the right to sue upon a legitimate mother as opposed to illegitimate children. No alleged tort feasor would have gone free had Louise Levy not slept on her legal rights. Certainly the alleged tort feasor cannot be held responsible for the failure of the claimant to assert her rights timely. Hence, the argument that a tort feasor goes free has no legal basis in the Levy case.

Under the plain provisions of Article 2315, the mother of Louise Levy was possessed of the action.

V. THE COURT HAS NOT TAKEN INTO ACCOUNT THE RATIONAL JUSTIFICATION FOR THE REQUIREMENT OF LEGITIMACY IN WRONGFUL DEATH ACTIONS.

The Court has assumed that the requirement of legitimacy is somehow aimed at curbing "sin" or solely at discouraging the bringing of children into the world out of wedlock. The Court has seized upon this as the only possible justification for the requirement of legitimacy. The Court overlooks the entire basic presuppositions which underlies Louisiana's Civil Law.

In sharp contrast to the Common Law, the Napoleonic Civil Law looks to the preservation of the family as one of the ends of law. To that end, rights in family confer rights in property. A person's legal heirs cannot be disinherited by will. Louisiana is not a State where free testation is allowed. One cannot fail to leave to one's descendants a certain portion of one's property. Louisiana Civil Code Articles 1493-1495. The Legislature further in defining the class of those who might sue for wrongful death confer the action on those whom it thought would be closest to the deceased. It took care of the surviving spouse and legitimate children who were undoubtedly the immediate family of the deceased. It took account of the fact that in all likelihood illegitimate relations were not part of the close family circle. It next conferred rights upon the next more immediate relations, the parents of the deceased. The thinking of

the Court undoes the thinking of the Legislature. The Court seems to have ignored the fact that the classifications chosen are presumably reasonable, non-discriminatory and non-arbitrary. *Snowden vs. Hughes, supra.* The Court has failed to heed its own statement, "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan vs. State of Maryland,* 366 U.S. 420 at 427. Even Louisiana's unique historical legal situation, the judgment of the Legislature that these classifications were doubtlessly by the most normal and correct and those who would suffer most by the death of the decedent and it is obvious that a rational basis of a classification adopted by Louisiana exists.

The Legislature of Louisiana could have said that friends have an action for wrongful death of another friend, employees have an action for the death of their employers, or any of a host of other beneficiaries, but the Legislature chose those it felt in the general run of affairs would be the most likely to suffer loss because of a wrongful death. The fact that inequality may result is of no consequence. "State Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *McGowan vs. State of Maryland,* 366 U.S. 420 at 427.

The Court in its Glona opinion alludes to the fact that the problem of fraudulent claims should be one of burden of proof. Louisiana saw fit to avoid the

problems inherent in such a context by requiring that formalities as to status be observed. Indeed, the State is wise in requiring formalities. There are innumerable instances in the law where in order for a given legal consequence to occur, formalities must be complied with. Marriage, adoption of children, purchase and sale of immovables and any of a host of other matters require that formalities be complied with before legal effect may be granted. Certainly, to require legitimacy where legitimacy so easily obtains in Louisiana is not imposing an undue and discriminatory burden. In matters of family and property law, Louisiana has clearly stated that a legal status must exist or rights will not flow. Louisiana has thereby avoided all of the inherent uncertainties and problems connected with a context to prove correct status by burden of proof and balancing evidence and counter evidence.

The Court has not gone forward and sought justification for the wrongful death statute.

The judgment of history which for so many years has set limitations on the rights of illegitimates to inherit or to sue for wrongful death requires that the Court give further consideration to the rational presuppositions for the requirement of legitimacy. Certainly the creators of Lord Campbell's Act and its progeny and all of the legislators and judges who heretofore have passed upon these requirements cannot be declared to have been lacking in rationality. The fact that today, some States are relaxing these

laws while others have not is ample proof of the fact that in the minds of many, there exists the reasons for the rendition of these laws. The fact that in some of our States, the action for wrongful death is allowed only in the event of the death of the mother, but not on the father, is further proof that in the judgment of these legislators, the rational basis exists for withholding the actions in the case of the death of a father. TCA 20-607, *Dilworth vs. Tisdale Transfer and Storage Co.*, 354 S.W.2d 261 (Tenn. 1962); Georgia Code 74-204; Maryland Code Art. 67 sec. 4. *State for Use of Holt vs. Try, Inc.*, 152 A.2d 126 (Md. App. 1959); South Carolina Code 10: 1953. *Smith vs. Atlantic Coast Line R. Co.*, 212 S.C. 332, 47 S.E.2d 725 (1948); Vernon's Ann. Tex. Civ. St. Arts. 4671, 4675. *Jones vs. S.S. Jessie Lykes*, 253 F.Supp. 368 (E.D. Tex., 1966); *Deathredge vs. Fort Worth and D.C.R. Co.*, 154 S.W.2d 918; *Gross vs. Franz*, 287 S.W.2d 289; *H. & S. A. Ry. Co. vs. Walker*, 106 S.W. 705; *DeMedio vs. Fort Norris Express Co.*, 71 N.J. Super. 190, 176 A.2d 550 (1961); *Frazier vs. Oil Chemical Co.*, 407 Pa. 78, 179 A.2d 202 (1962); N.Y. Estates, Powers, and Trusts Law sec. 4-1.1 (1) (1967); *Evans v. United States*, 100 F.Supp. 5, (W.D. La. 1951); Louisiana Civil Code Articles 178-245. Under the Federal Employers Liability Act, an illegitimate may not have a cause of action depending upon State law. *Hammond vs. Pennsylvania R. Co.*, 54 N.J. Super. 149, 149 A.2d 515, rev'd on other grounds 31 N.J. 244, 156 A.2d 689.

With the law in such a state of flux, it cannot be presumed that Louisiana's Legislature has acted irrationally.

VI. THE COURT'S DECISION WILL UNDERMINE AND PLACE IN JEOPARDY RIGHTS IN PROPERTY IN LOUISIANA AND IN MANY OTHER STATES.

The opinion of the Court is of such breadth that its thinking can be utilized to declare unconstitutional all of the laws of the various States precluding or limiting the action for wrongful death and descent and distribution in the United States. The thinking of the Court means that the laws of the various States governing inheritance by illegitimates have run afoul of the constitution.

Any illegitimate child henceforth may claim that he or she is being denied fundamental intimate relations because of the failure of the State to accord to a legitimate a right of inheritance. The very same thinking which the Court has employed to confer upon an illegitimate a property right to sue for wrongful death can likewise confer a property right in inheritance.

The potential retroactive application of the decision in the instant case renders title to real property as well as personal property vulnerable. Nowhere is this more true than in Louisiana where the institution of a forced heirship prevails.

Louisiana's status as a member of the family confers rights in property. Louisiana does not have free testacy. The testament, therefore, may only dispose of a certain portion of his property. The remainder must go to those who are classed as forced heirs which means principally the descendant of a person. Civil Code Articles 1493-1495.

Where in Louisiana intestacy exists, property is again distributed amongst the legal heirs who naturally include the children but exclude illegitimate children. Civil Code Articles 887, et seq.

Because of the breadth of the thinking of the Court in the instant case, the lingering possibility of an illegitimate existing or of an illegitimate through whom a title might be attacked is a real issue. Because of forced heirship, it is necessary that title examiners examine all succession proceedings and satisfy themselves as to the proper familial status of persons who appear in the chain of title. Henceforth, the possible existence of an illegitimate creates a cloud on title.

The Louisiana Legislature has been strict in its requirement that proper status exists. Where the property system of a State depends upon the legitimacy relationships, it is important that the entire security of property be properly protected. Louisiana has accomplished this by simply requiring that correct status exists. But by the breadth of the thinking of the Court in the instant case, security of property in Louisiana and in other States has been seriously undermined.

VII. IN GRANTING A RIGHT OF ACTION TO ILLEGITIMATES, THE COURT HAS FAILED TO UNDERTAKE A PROPER BALANCING OF INTERESTS.

There exists a social interest in aiding the plight of illegitimates. There exists a social interest in eradicating the base stigma which attaches to illegitimacy. On the other hand, there also exists a social interest in preserving legitimate relationships, in fostering the family in preserving the security of transactions and property rights and in protecting society from uncertainty in matters of family law.

The Court has seen fit to recognize as a family right the right of illegitimates to sue for wrongful death. In so doing, it has broken allegiance to the traditional concepts of equal protection of the laws, has jeopardized the rights of legitimate relations and undermined the security of transactions and property rights in the various States. Henceforth, in those States where the party entitled to sue for wrongful death happens to be the legal heir of the decedent, then by the force of this decision, that person shall have inheritance rights likewise.

It should be noted further that the Court has and should recognize a legitimate interest in preserving the basic tenets of federalism. By the decision in the instant case, the Court has undertaken an incursion into areas preserved to the States. Henceforth, all State law relating to family matters and setting up classifications between persons must pass the test of

rationality in accordance with the thinking of the Court.

Louisiana has attempted to balance the interests of the illegitimate with the competing interests of the other members of the family and of the society in general. She has accorded the illegitimates certain rights and made for them a rather simple process to obtain proper status. Yet the Court declared that Louisiana's balancing of the social interest has been irrational and the Court has substituted its own. Louisiana has struck a balance of the competing social interest which is in no way discriminatory, unreasonable or arbitrary. Yet the Court entertains other views concerning these important matters. *Ferguson vs. Skrupa, supra.* It is certainly unfortunate that in the name of conferring property right upon illegitimates, the entire social interest in the security of property and the rights of family shall confer property rights in a State such as Louisiana should suddenly be imperilled.

VIII. THE COURT ERRS IN ACTING AND SITTING AS A SUPER LEGISLATURE FOR THE FIFTY STATES IN MATTERS OF HISTORIC CONCERN TO THE STATES ONLY AND HAS THEREBY IMPINGED ON THOSE RIGHTS CONSTITUTIONALLY RESERVED TO THE STATES.

Every case brought pursuant to the Fourteenth Amendment involves delicate issues of the relationship between the States and the national government. Historically, the action for wrongful death has been

one of those matters committed to the wisdom of the State Legislatures. Laws relating to the family generally have been left to the States. Yet, with the instant decision, the groundwork has been laid for judicial legislation in these vital areas of personal concern. None can say but that the Court has acted as a super legislature. By declaring a law unconstitutional, it has legislated. It has legislated for Louisiana and the other States. It has imperilled a system of property rights unique to Louisiana. This is done and accomplished in the name of the Fourteenth Amendment. The Court has legislated in an area of historic State concern only. The Court has violated its own limitations as set forth in *Snowden vs. Hughes, supra,* wherein it was held that the Fourteenth Amendment and the Civil Rights Act were not to become vehicles whereby the national government might undertake to govern matters of historical exclusive State cognizance. The Tenth Amendment has indeed become meaningless when State wrongful death statutes have become the concern of the national government. The Fourteenth Amendment and the Civil Rights Act were never intended to become the vehicles whereby the social acceptability of the family law of the various States was to be subjected to national scrutiny. In the name of equal protection of the laws, common law wives will claim the same rights as legitimates and persons who for any form or defect in status will clamor that their constitutional rights have been abridged. These matters will henceforth cease to be a proper matter for exclusive State competence.

CONCLUSION.

For the reasons stated above, a rehearing should be granted and the judgment below affirmed.

Respectfully submitted,

PORTEOUS & JOHNSON,

WILLIAM A. PORTEOUS, JR.,
WILLIAM A. PORTEOUS, III,
925 Hibernia Bank Building,
New Orleans, Louisiana 70112,
HONORABLE JACK P. F.
GREMILLION,
Attorney General,
State of Louisiana,
DOROTHY D. WOLBRETTE,
Assistant Attorney General,
L. K. CLEMENT, JR.,
Assistant Attorney General,
State Capitol Building,
Baton Rouge, Louisiana,
INGARD O. JOHANNESEN,
547 National Bank of Commerce
Building,
New Orleans, Louisiana 70112.

CERTIFICATE.

I HEREBY CERTIFY to the effect that this Petition for Rehearing is presented in good faith and not for delay, and I also certify that this Petition for Rehearing is restricted to the grounds above specified.

WILLIAM A. PORTEOUS, JR.

CERTIFICATE.

I HEREBY CERTIFY that a copy of the above and foregoing Brief has been served upon Mr. Adolph J. Levy and Mr. Lawrence J. Smith, 1407 Pere Marquette Building, New Orleans, Louisiana, by depositing same in the United States Post Office, first class, postage prepaid, addressed as above this .... day of ....., 1968.

I FURTHER CERTIFY that copies of the above and foregoing Brief have been served upon Mr. Norman Dorsen, 40 Washington Square, South, New York, New York 10003, and upon Mr. Melvin L. Wulf, 156 Fifth Avenue, New York, New York 10010, by depositing same in the United States Mailbox, Air Mail postage prepaid, addressed as above, this ..... day of ....., 1968.

WILLIAM A. PORTEOUS, JR.